Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-921

ROBERT PAGLIARA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ASSERTION AND PRESERVATION OF THE FEDERAL CLAIM	6
REASONS FOR ALLOWANCE OF THE WRIT	7
CONCLUSION	10
APPENDICES	1a-11a
MEMORANDUM DENYING LEAVE TO APPEAL	1a
ILLINOIS APPELLATE COURT OPINION	2a

LIST OF AUTHORITIES CITED

Cases

Brown v. Illinois, 422 U.S. 590 (1975)	8
Schneckloth v. Bustamonte, 412 U.S. 219 (1973)	7
United States v. McCaleb, 552 F.2d 717 (CA 6th) (1977)	8
United States v. O'Looney, 544 F.2d 385 (CA 9th)	
United States v. Watson, 423 U.S. 411 (1976)	8
(1976)	9
Wong Sun v. United States, 317 U.S. 473 (1963)	8

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To the Honorable, The Chief Justice and the Associate Justices, of the Supreme Court of the United States:

The Petitioner, Robert Pagliara, a/k/a Robert Sells, prays that a Writ of Certiorari issue to review the order of the Supreme Court of Illinois denying the Petitioner

leave to appeal the judgment of the Illinois Appellate Court, First District, affirming Petitioner's conviction for possession of a controlled substance in violation of Section 1402(a), Chapter 56½, Illinois Revised Statutes, 1971.

OPINION BELOW

The memorandum order of the Illinois Supreme Court denying your petitioner leave to appeal appears *infra*, Appendix A, page 1a. The opinion of the Illinois Appellate Court, First District appears *infra*, Appendix B, page 2a, and is reported at 47 Ill.App.3d 708, 365 N.E.2d 72 (1977).

JURISDICTION

The Supreme Court of Illinois denied petition for leave to appeal on September 30, 1977. This petition is filed in accordance with Rule 22 calling for the filing of same within 90 days of the above denial; and this Court's jurisdiction is invoked pursuant to Title 28, U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the contraband seized from the Petitioner's car should have been suppressed as evidence because the alleged consent to search the vehicle was obtained by police moments after their illegal arrest of the petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from a criminal conviction. Petitioner was charged in a two count indictment with the possession of three grams of lysergic acid diethylomide (LSD) and three hundred grams of PCP, a derivative of Phencyclidine, in violation of the Illinois Controlled Substance Act. He was convicted of possession of PCP.

The following facts were elicited at a pre-trial hearing on Petitioner's Motion to Suppress. The Petitioner was attempting to start an automobile in a Lemont, Illinois alley during the early morning hours on May 13, 1973. Police Officers of that Village approached him, identified themselves and ordered him from the car. The Police told him to produce a driver's license when he informed them he was trying to start the car.

Unable to produce a driver's license, the Petitioner went into a nearby house and returned to where he left the Officer, carrying a borrowed traffic citation and accompanied by a female friend. This friend, Cheryl Sells, brought with her the title to the car which she handed to one of the Officers. Nearing the Police, the petitioner dropped the citation to the ground. As he bent over to retrieve it, his shirt shifted, exposing to view plastic bags stuck in his belt. One of the officers reached into his pants and removed one of those bags.

The Police placed the Petitioner under arrest for possession of suspected drugs. After advising him of his *Miranda* warnings, they completed their search of the Petitioner's person. One of the policemen then asked him if they could search the automobile. The Petitioner

replied that the car was not his and opened the trunk for them.

Moments later, further suspected drug contraband was recovered from the automobile's interior, along with an IRS collection letter addressed to the Petitioner. The drug on the Petitioner's person was later determined to be LSD, and that the Police took from the car as PCP.

At the conclusion of the hearing, the trial judge concluded that though the initial confrontation might have justified a stop and frisk pat-down of the Petitioner's person, the officer's intrusion into his pockets was unreasonable and the contraband seized thereby would be suppressed. However, the court felt that the Petitioner lacked standing to complain of the automobile search, but that if he did have standing the case would be one of consent and the Petitioner's motion as far as that seizure would be denied.

The State never appealed from the trial judge's suppression of the LSD seized from the Petitioner's person. Trial ensued on the remaining count of the indictment and the defendant was convicted after a bench trial.

On appeal to the Illinois Appellate Court, Petitioner argued that the PCP seized from the vehicle should have been suppressed. He urged that any purported consent was *per se* involuntary being the product of an illegal arrest. The state argued that the Petitioner's consent to search the vehicle cured any defect as to the contraband being the fruit of an illegal arrest.

In its holding, the Appellate Court noted that the state conceded the Petitioner's arrest was improper. It then proceeded to determine the voluntariness of the consent under what it called the "totality of circumstances," but it explicitly omitted from its consideration of those circumstances the factor of the Petitioner's illegal arrest.

Finding that the Petitioner's consent was voluntary, it affirmed the trial judge's refusal to suppress the contraband recovered from its automobile. The Petitioner's conviction was affirmed.

The Petitioner then sought Leave to Appeal in the Supreme Court of Illinois. The issue therein was whether *vel non* a consent elicited following an illegal arrest could vitiate that illegality to permit admissibility of contraband found during the subsequent search. The Petitioner relied heavily on this Court's ruling in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

Additionally, Petitioner argued that the Illinois cases relied upon by the Appellate Court were inapposite to the facts herein because they dealt with consent searches following valid arrest. On September 30, 1977, the Illinois Supreme Court denied Petitioner Leave to Appeal and Petitioner now seeks certiorari.

ASSERTION AND PRESERVATION OF THE FEDERAL CLAIM

The issue presented for review here was first raised in the Petitioner's pre-trial Motion to Suppress evidence. After denial of that Motion, the issue was raised again in the Petitioner's post-trial motion for new trial.

Upon appeal to the Illinois Appellate Court, the Petitioner made the issue one of his points relied on for reversal, but the Court failed to address the issue. It was the sole issue presented in Petitioner's Petition for Leave to Appeal in the Illinois Supreme Court. That petition was summarily denied on September 30, 1977.

REASONS FOR ALLOWANCE OF THE WRIT

THIS COURT SHOULD REVERSE THE JUDGMENT BELOW BECAUSE THE SEARCH THE PETITIONER ALLEGEDLY CONSENTED TO WAS THE BYPRODUCT OF AN ILLEGAL ARREST AND THEREBY REPUGNANT TO THE FOURTH AMENDMENT.

This Petition seeks certiorari to gain reversal of lower court rulings which denied the Petitioner's Motion to Suppress. Below, in order to resolve the question of admissibility of the contraband seized from the Petitioner's car, the Illinois Appellate Court treated the case as one where a consent to search had been lawfully obtained.

To determine that the consent elicited was truly voluntary, the court employed an analysis of what it called the "totality of circumstances" surrounding the consent. (Appendix Page 8a) Placing heavy reliance on the fact that the Petitioner had been given his *Miranda* warnings upon arrest and had not been subject to any overt display of force by the arresting officers, the court declared that this absence of coercion belied any claim of non-consent. (Appendix Page 8a)

We urge that the lower court's analysis was clearly erroneous in at least two ways; it failed to consider the highly relevant circumstance that the alleged consent followed an illegal arrest; and that the "totality" it considered was incomplete or incorrect in light of this court's holding in *Schneckloth v. Bustamonte*, 412 U.S. 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

That the Petitioner's arrest was illegal cannot now be open to question, inasmuch as the State conceded the

same below (and) as the reviewing court itself noted. (Appendix Page 7a) We believe that had the lower court added this important fact into its reasoning, the doctrines of *Wong Sun v. United States*, 371 U.S. 473, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and its corollary *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), should have been applied. This approach is suggested by Mr. Justice Powell's concurrence in *United States v. Watson*, 423 U.S. 411 at 425, 96 S.Ct. 280 at 828, 46 L.Ed.2d 598 at 610 (1976), and followed in *United States v. McCaleb*, 552 F.2d 717 (C.A. 6th) (1977), discussed below.

The immediacy of the consent obtained by the police to their acts of illegal arrest and unlawful search performed upon the Petitioner parallels Toy's statement to Federal agents in *Wong Sun, supra.* It was therein that this Court ruled that "verbal evidence which derives so immediately from an unauthorized arrest is no less the fruit of official illegality than the more common tangible faults of unwarranted intrusion." We urge this court to consider whether *vel non* a consent under these circumstances is worthy of the same protection as Toy's verbal evidence. This court has not yet addressed itself to this precise issue.

Although the court below placed some emphasis on the giving of *Miranda* warnings to the Petitioner upon his arrest, an application of the *Brown* four-prong test here should have led to a different result. Despite the warnings, the consent elicited by the police occurred seconds later in an atmosphere changed in a few moments from a minor traffic stop into a narcotics arrest. Furthermore, the consent must be viewed as the method by which the officers could continue their search

for additional contraband. A correct inspection of these facts with *Wong Sun* and *Brown* borne in mind, should have led the lower court to conclude that no attenuation had occurred to purge the primary taint of the Fourth Amendment violation from what followed. Compare *United States v. O'Looney*, 544 F.2d 385 (C.A. 9th) (1976) cert. denied 429 U.S. 1023, 97 S.Ct. 642 (1976).

Early in 1977, a Sixth Circuit panel considered the effect of an illegal arrest upon a subsequent consent to search in *United States v. McCaleb, supra*, a narcotics prosecution. At issue there was the voluntariness of a consent granted by a traveller accosted by Federal Agents making an unlawful investigative stop at Detroit Airport. The Court reviewed the District Court's denial of the defendant's Motion to Suppress. Initially, it found that the illegality of the Defendant's arrest cast grave doubt upon the voluntariness of his consent. After an examination of the totality of circumstances bearing in mind the doctrines of *Schneckloth, Wong Sun* and *Brown* (as we have urged above), the Court concluded McCaleb's consent was involuntary and suppressed the contraband seized.

It is the rationale of the Court of Appeals in *McCaleb* we petition this Court to adopt here. Firstly, we believe its opinion sound in its application of *Schneckloth* by including the factor of the Defendant's illegal arrest into its "totality of circumstances." This is in sharp contrast to the studied neglect of that same circumstance here by the court below.

Next, we believe the *McCaleb* court correctly placed great emphasis on the initial illegality of the arrest in its approach to the issue of consent voluntariness. Again, this differs from the Illinois court's considerations. Further, the Sixth Circuit holding placed in proper

perspective the limited ability of *Miranda* warnings to attenuate the primary taint of the initial illegality. Once more, such reflects a far different viewpoint from that expressed by the lower court when it found that the warnings were of substantial significance.

Lastly, the opinion in *McCaleb* recognized a dichotomy unobserved by the Illinois panel when it distinguished itself from the valid arrest cases such as *United States v. Watson*. The lower court had relied for authority on Illinois opinions concerning consent which followed valid arrests. We maintained those cases were inapposite in our Petition for Leave to Appeal to the Illinois Supreme Court before we knew of *McCaleb*. Our knowledge now reinforces our belief that the lower court put this case into a *genre* in which it simply did not belong. We pray that this court will see fit to grant certiorari to correct the error below by declaring the vitality of *McCaleb*'s application in state forums.

CONCLUSION

WHEREFORE, Petitioner, Robert Pagliara, respectfully requests that a writ of certiorari issue to the Supreme Court of the State of Illinois.

Respectfully submitted,

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APPENDIX A

STATE OF ILLINOIS
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CLELL L. WOODS
CLERK

TELEPHONE
AREA CODE 217
782-2035

September 30, 1977

Mr. Martin Schachter
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No. 49546 - People State of Illinois, respondent, vs. Robert Pagliara, etc., petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX B

OPINION OF THE ILLINOIS APPELLATE COURT

365 N.E.2d 72

PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Robert PAGLIARA, a/k/a Robert Sells,
Defendant-Appellant.

No. 76-86.

Appellate Court of Illinois,
First District, Second Division.

March 29, 1977.

STAMOS, Justice.

Defendant, Robert Pagliara, was charged by indictment with the offense of possession of 300 grams of PCP, a derivative of phencyclidine and a controlled substance, in violation of Ill.Rev.Stat. 1971, ch. 56½, par. 1402(a). Upon a bench trial defendant was found to be guilty as charged. Judgment was entered on the finding and defendant was sentenced to serve a term of probation of five years, the first year of which to be served in the Department of Corrections under conditions of periodic imprisonment.

From entry of the judgment of conviction defendant appeals. The following issues are presented for our consideration: (1) whether the trial court erred in denying defendant's motion to suppress as evidence certain contraband and oral statements allegedly obtained in contravention of defendant's constitutional rights; (2) whether the trial court erred in admitting into evidence the aforementioned contraband due to an alleged failure to adequately establish a chain of custody and possession; and (3) whether the evidence properly adduced at trial was sufficient to establish defendant's possession of the aforementioned contraband beyond a reasonable doubt.

A review of the facts reveals that at approximately 2:48 A.M. on May 13, 1973, defendant was unsuccessfully attempting to start an automobile that had been parked so as to block an alley in the vicinity of 418 Main Street in Lemont, Illinois. The vehicle was owned by Robert and Cheryl Sells. At trial, defendant indicated that he occasionally used the vehicle; that the last time he had been in the vehicle was approximately two weeks prior to the incident; that the Sells had loaned him the automobile for the evening on the date of the incident; and that they "gave" defendant title to the vehicle a few days thereafter.

Defendant, as sole occupant of the vehicle, was in the driver's seat when he was approached by Lemont Police Department Corporal Donald Wiegand. Wiegand placed a radio message for assistance to his partner, Charles Wood, and inquired of defendant as to his identity and the ownership of the vehicle in defendant's possession. Defenant told Wiegand that he had no personal identification on his person but that such documents might be obtained from a nearby apartment. Officer Wood ac-

companied defendant to the apartment building and waited outside the door while defendant entered an upstairs apartment.

During this time, Cheryl Sells, descended to the street, approached Wiegand, identified herself, and showed Wiegand a certificate of title to the vehicle in which defendant had been seated. Wiegand asked her if defendant was her husband. She did not reply. Wiegand insisted upon verifying defendant's driver's license.

Defendant did not possess such license. However, he returned to the scene bearing a traffic citation which had been issued in the name of one Robert Sells. At trial, defendant admitted that he had obtained the citation from the Sells' apartment, with Robert Sells' permission, for the purpose of providing false identification to the investigating officers.

As defendant walked toward Wiegand, defendant dropped the traffic citation to the ground, bent down to retrieve it, and as he arose Wiegand had occasion to observe a plastic bag hanging from defendant's belt. Wiegand seized the bag, placed defendant under arrest, and informed defendant of his constitutional rights. The bag was subsequently discovered to contain quantities of chemical contraband. This contraband was suppressed as evidence prior to trial of the instant cause and the propriety of such suppression is not at issue in the case presently at bar.

Defendant was then asked by the officers if they could search the automobile. Defendant responded, "Go ahead and search." Defendant personally removed the key from the ignition, opened the door of the automobile, and then opened the trunk of the vehicle with an additional key then in his possession. Officer Wood search-

ed the interior of the vehicle and in an area described as being under the dashboard near the heater duct by the firewall, Wood discovered two plastic bags. One contained a white powdered substance and the other contained $6,000 in United States currency. The bags were shown to defendant who responded, "Where did that come from?" Wood handed the two newly recovered bags to Wiegand who summonded their supervisor, Sergeant Richard Stech.

Upon his arrival on the scene, Stech was presented with the plastic bags and their contents by Wiegand. Stech examined the bag containing white powder and found that it contained smaller bags surrounding the white powder which had been formed into balls of an unspecified diameter. Stech personally transported the evidence to the Lemont Police Department.

At the station house, Stech attempted to question defendant. Defendant alternatively stated that his name was Robert B. Sells and Robert Pagliara. Defendant's fingerprints were shown to be those of Robert Pagliara. Defendant indicated that he would not speak to Stech but expressed a willingness to talk to Agent Fred Garcia of the Cook County Sheriff's Police. A telephone connection was established between defendant and Garcia. Stech was present in the room in which defendant was situated.

According to Stech, defendant asked Garcia, "What kind of a deal can we make?" Defendant then offered, "You could take the money" and he "defendant' would retain "the stuff."

Again, upon completion of the telephone call, defendant informed Stech that he knew the officer was tired and was poorly remunerated for his services. Where-

upon defendant offered Stech the money recovered from the automobile to cover Stech's inconvenience. According to the terms of the proposed bargain defendant would retain "the stuff." Defendant was then processed and incarcerated.

Stech placed the plastic bag of white powder in a metal cabinet located on police property. The plastic bag containing the recovered currency was inventoried and it too was placed in the cabinet. The cabinet was locked. Stech testified that the cabinet has a double lock to which only he and the chief of police possessed keys and that the only other items in the cabinet on the date in question were official documents.

Later that morning, Stech removed the plastic bag containing the white powder from the cabinet in which it had been stored. Stech transported it to the Cook County Sheriff's Police Station in Bedford Park, Illinois. The substance was field tested and produced a chemical reaction indicating that the substance was either cocaine or PCP. Officer Jones weighed and photographed the powder, placed it in evidence bags and initialed each bag. The bags were then placed in the sheriff's narcotics locker.

Defendant was transported to Bedford Park Station where he again spoke to Sergeant Stech. Defendant again offered to allow Stech to keep the money seized from the vehicle in exchange for defendant's release. Defendant was then incarcerated in the Bedford Park detention facility.

Jones subsequently removed the narcotics from the locker and transported it to the Chicago Crime Laboratory where he deposited the contraband and was given a receipt. The recovered currency was transferred to an agent of the Internal Revenue Service.

Officer Jones subsequently returned to the Chicago Crime Laboratory where, after signing for the evidence, he received an envelope containing the contraband. The envelope was dated and bore the Crime Laboratory case number. Chemical analysis performed at the laboratory indicated that the substance was a derivative of PCP, otherwise known as phencyclidine, a controlled substance. The analysis was duly performed by a qualified expert chemist who replaced the substance in its plastic container, resealed and stapled the bag, and placed it in another plastic bag which he sealed by means of a heating machine.

Upon receiving the evidence from the Chicago Crime Laboratory, Jones transported the narcotics to the Bedford Park Sheriff's facilities where they were stored in the narcotics safe and removed by Jones as required for court appearances.

Defendant initially contends that the trial court erred in denying defendant's motion to suppress as evidence the narcotics recovered from the automobile in defendant's possession as being the product of an arrest effected without probable cause. The State concedes that this arrest, which occurred prior to the search of the vehicle, was improper. However, the State urges that defendant consented to the search of the vehicle; that such consent was voluntarily given; and hence, that the evidence recovered as a result of the search was properly adduced at trial.

[1-4] It is well-settled that consent to what might otherwise constitute an unreasonable search constitutes a waiver of the constitutional privilege. (*People v. Hampton* (1972), 5 Ill.App.3d 220, 282 N.E.2d 469.) The burden is on the prosecution to establish by clear and positive testimony that consent to a warrantless search

was voluntarily given and not the product of coercion. (*People v. Ledferd* (1967), 38 Ill.2d 607, 232 N.E.2d 684; *People v. DeMorrow* (1974), 59 Ill.2d 352, 320 N.E.2d 1.) Whether valid consent has been given is a question of fact to be determined initially by the trial court, and where the evidence on this issue is conflicting this court will uphold the finding of the trial court unless it is clearly unreasonable. (*People v. Ledferd, supra.*) Such finding by the trial court must consider the totality of circumstances surrounding the giving of the consent in order to determine its voluntariness. This is true regardless of the fact that the consenting party may be in custody. *People v. Ledferd, supra.*

[5] A review of the facts in the case at bar indicates that defendant's consent was voluntary and effective. There is no evidence that at the time of his arrest defendant was the object of any duress or coercion, either actual or implied. Defendant admitted that after he was placed under arrest he was advised that it was his right to remain silent and to refuse to answer questions without the presence of an attorney. At trial defense counsel stipulated that defendant was fully advised of his constitutional rights as required by *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. There is no showing that defendant was interrogated or that he asked to speak to an attorney. Defendant testified that the officers did not draw their weapons. Nor was defendant handcuffed at the time of the search. Defendant's associates were situated in the immediate vicinity of the arrest. Defendant's consent to search the vehicle was unequivocal and specific. He personally obtained the key to the vehicle's trunk and assisted the officer by opening it. In view of this total lack of coercion or compulsion the trial court properly found that defendant's consent was voluntary and the

evidence acquired as a result of this search was properly adduced at trial.

[6] Within this context, defendant also suggests that the trial court erroneoulsy admitted into evidence testimony regarding defendant's various attempts to bribe the arresting officers in order to secure his release from custody. We note that defendant was properly arrested for possession of narcotics recovered during the course of a valid search of the vehicle in defendant's possession. The statements in question were made subsequent thereto and after defendant had been fully admonished as to his constitutional rights. There is no showing that the statements were in any way coerced. Indeed, we are confident that defendant's deliberate and unsolicited attempts to bribe Officers Stech and Garcia were sufficiently acts of free will to purge the taint of any police misconduct occurring prior to the search so as to permit the introduction of such statements at trial. *c.f. Brown v. Illinois* (1975), 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416.

[7-9] Defendant next contends that the trial court erred in admitting into evidence the aforementioned contraband due to an alleged failure to adequately establish a chain of custody and possession. The rule is well-established that a foundation for the admission in evidence may be made through its identification by a witness or through establishment of a chain of possession. To require both identification of the object and establishment of a chain of possession would impose an unnecessary burden and would not assure a fairer trial to the accused. (*People v. Sansone* (1976), 42 Ill. App.3d 512, 1 Ill.Dec. 101, 356 N.E.2d 101.) There is not the slightest proof in the record of any substitution or any form of tampering with the contraband recovered from

defendant's vehicle other than the scientific testing of the contraband. The prosecution was not required to exclude all possibility of tampering. All that is required is that there be only the reasonable probability that the article has not been changed in any important respect. (*People v. Marquis* (1974), 24 Ill.App.3d 653, 321 N.E.2d 480.) A review of the record clearly indicates that the State established a proper foundation for the introduction into evidence of the contraband by describing a continuous chain of possession in elaborate detail. The trial court's ruling was proper.

Defendant finally contends that the evidence adduced at trial was insufficient to establish his possession of the contraband beyond a reasonable doubt.

[10, 11] In order to support a conviction for unlawful possession of contraband, the State must establish beyond a reasonable doubt not only that the accused had knowledge of the presence of contraband, but also that the contraband was in the accused's possession and control. (*People v. Galloway* (1963), 28 Ill.2d 355, 192 N.E.2d 370.) Knowledge of the location of contraband, although an element, is not the equivalent of possession. *People v. Jackson* (1961), 23 Ill.2d 360, 178 N.E.2d 320.

[12] A review of the evidence adduced in the case at bar yields a sufficient factual basis to support defendant's constructive possession of PCP. The contraband was recovered from its concealed position in an automobile over which defendant had exerted sole dominion immediately prior to this arrest and on earlier occasions. (*c.f. People v. Huth* (1977), Ill.App., 4 Ill.Dec. 472, 360 N.E.2d 408 (filed January 25, 1977).) Defendant's several subsequent attempts to secure his release by bribing the arresting officers while retaining possession of the contraband, as well as his attempt to avoid

prosecution by presenting false identification to the investigating officers, are matters which serve to establish defendant's knowledge of contraband within his exclusive control. (*c.f. People v. Mack* (1957), 12 Ill.2d 151, 145 N.E.2d 609.) We are satisfied that defendant's guilt of the offense charged was established beyond a reasonable doubt.

For the above reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DOWNING, P. J., and PERLIN, J., concur.